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# In the Supreme Court

OF THE  
**United States**

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OCTOBER TERM, 1976

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No. **76-7**

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SHASTA

and  
HELEN FAYE GENERES,

*Real Party in Interest*

*Petitioner*

vs.

TITLE INSURANCE AND TRUST COMPANY, et al.,

*Respondent*

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**PETITION FOR A WRIT OF CERTIORARI**  
to the California Court of Appeal  
Third Appellate District

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HELEN FAYE GENERES  
2538 Waldon Street  
Redding, California 96001  
Telephone (916) 243-0586  
*Petitioner.*

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In the  
SUPREME COURT  
of the  
UNITED STATES  
October Term 1976  
NO. \_\_\_\_\_

Superior Court in and for the County of  
Shasta, California and Helen Faye Generes  
the real party in interest,

Petitioners

vs.

Title Insurance and Trust Company, a  
California Corporation, and the California  
Court of Appeal, Third Appellate District,

Respondents

\_\_\_\_\_  
Petitioner prays that a writ of certiorari  
issue to review the peremptory writ of pro-  
hibition by the Court of Appeal of April 6,  
1976 prohibiting the Honorable Richard B.  
Eaton from sitting in Shasta County Superior  
Court Case No. 45113.

The petition for rehearing was denied,  
without opinion. The petition for hearing was  
denied without opinion on March 31, 1976.

Appendix "C".

2.

## OPINIONS BELOW

The decision of the Shasta County Superior  
Court is attached as appendix "A"; and the  
decision of the Court of Appeal as appendix "B"

## JURISDICTION

The jurisdiction of this Court is invoked  
under 28 U. S. C. Section 1257 (3).

## QUESTIONS PRESENTED

Does a Court of Appeal abuse its discretion  
in issuing a peremptory writ prohibiting the  
trial court judge from sitting in the case when  
defendant TI&T's dissatisfaction stems as a re-  
sult of the trial court's adverse ruling from  
the facts learned in participation in the case  
within the four corners of the courtroom?

Is it not a denial of due process and  
equal protection of the laws under the  
Fourteenth Amendment of the Constitution of  
the United States for the Court of Appeal  
to reverse the trial court judgment in favor  
of petitioner for \$20,000. against TI&T  
and permit TI&T to use a disqualification  
motion as a substitute for appeal gambling  
to obtain a favorable decision by another  
judge?

## CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth and Four-  
teenth Amendments of the United States Con-  
stitution.

Constitution of the United States, Amendment XIV:

"..no State shall make or enforce any law which shall abridge the privileges of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case involves the following statutes of California:

California Code of Civil Procedure 170.6

pertinent parts..."..any party to or any attorney may establish by affidavit under penalty of perjury that the judge before whom the proceedings are pending is prejudiced against such party or attorney so that such party or attorney believes that he cannot have a fair and impartial trial before said judge or court.."

In the case at bar, it was defendant-respondents that scheduled the cases before the Honorable Richard B. Eaton, the judge they claim now is prejudiced against their interests because he ruled against them.

California Code of Civil Procedure Section 283:

"An attorney shall have authority to bind his client in any steps of an action by his agreement filed with the clerk or entered upon the minutes of the Court and not otherwise."

California Code of Civil Procedure 412.20 (4).

"Provides for entry of default if complaint

is not answered in thirty days.

STATEMENT OF THE CASE: the facts

1/  
In May 1970 Title Insurance and Trust closed an escrow. The complaint was served on TI&T in September 1972. Petitioner on October 24, 1972 by certified letter expressly provided for no extensions to answer the complaint. The return receipt was made a part of the affidavit to the trial court. TI&T by its letter of October 16, 1972 had indicated they intended to answer in the very near future. The trial court ruled that the very near future may mean ten to thirty days but it did not mean "forever". TI&T were well aware of petitioner opposition to its failure to answer her complaint. Petitioner took the default of TI&T in February 1975, over 15 months later. Petitioner had 54 days prior demanded an answer from TI&T attorneys. TI&T protested the entry of default and scheduled its motions to set aside the default before the Honorable Judge Eaton, the very judge they now claim is prejudiced against them. TI&T argued to the court as quoted from the reporter's transcript set forth in petitioner-respondent's brief in the Court of Appeal filed Aug. 13, 1974, on page 6. "I would like to respond to the comment she made about the delays that are involved. We are the defendants in the litigation and we have obviously no desire to prosecute the action any more rapidly than absolutely necessary. The trial court denied TI&T's motions, without prejudice to a renewed motion to determine if TI&T had a good defense. Judge Eaton resolved the conflicts in the affidavits of the parties and ruled TI&T did not have a good defense or a good excuse for its default. The case went to trial. The judgment was entered in favor of petitioner-plaintiff against TI&T for \$20,000.

1./ Title Insurance and Trust Company is hereafter referred to as TI&T.



5.

TI&T had admitted secondary liability. TI&T deleted 53 acres from the descriptions in the trust deeds that were to represent the security for the \$20,000. in notes. The land described in the trust deeds were lost in foreclosure to prior obligation leaving the security for the notes "valueless".

"A party is not required to exhaust its claim against the primary obligator before resorting to the liability of the title insurance company."

Howe vs. City Title Insurance. (1967)  
255 CA2d 85-97 [headnotes 1-2-3-4]  
Stephan vs. Title Insur. & Trust Co.  
225 CA2d 671-673

The Court of Appeal reversed on appeal ruling TI&T proposed answer accompanying its motion to vacate the default was sufficient; in spite of the fact that over 15 months had expired and the trial court had determined TI&T had neither a good excuse or a good defense. TI&T filed its memorandum of costs of approximately \$2000. in the trial court; and later its motion to disqualify Judge Eaton.

Quote: The Hon. Judge Eaton is prejudiced against TI&T so that declarant believes he cannot have a fair and impartial trial before said judge."

/s/ Atty. Wells."

Judge Eaton ruled that inasmuch as the Court had heretofore determined an issue of fact the motion would be disregarded. Appendix "A".

The Court of Appeal reversed and issued its peremptory writ April 6, 1976 prohibiting Judge Eaton from sitting in the case. Appendix "B".

6.

### REASONS FOR GRANTING THE WRIT

THE COURT OF APPEAL WAS ARBITRARY, CAPRICIOUS, AND ABUSED ITS DISCRETION AND ITS DECISION IS CONTRARY AND IN CONFLICT WITH BOTH STATE AND FEDERAL LAW AND VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

#### "The law"

"It is well established that it is within the discretion of the trial court to determine whether or not to grant a motion to vacate a default and absent a clear abuse of discretion the court's ruling should not be overturned."

(1975) Northridge Financial Corp. vs. Arthur E. Hamblin 48 CA3d 822 [1]

citing Transit Ads. Inc. vs. Tanner Motor Livery Ltd. 270 CA2d 275 (1969) [1]

"Before the trial court can be called to exercise its discretion in relieving from a default judgment, the party in default must show not only a good excuse but also a meritorious defense to the action; it must appear prima facie that a different result would be reached if the default was set aside; and a party must accompany his notice with an affidavit of merits or verified pleading which sets up a valid defense."

TI&T did not set up a valid defense. The trial court's determination was correct.

In Pulaski vs. Abbey Cont. (1969) 268 CA2d 883 the court held the trial court was within its discretion in determining that a showing of a meritorious defense had not been made.

7.

"The conflicting evidence rule does not permit weighing of the evidence or reversal of the judgment."

Waller vs. Brooks (1969) 267 CA2d 389  
[Headnotes 2, 3, 4, 6, & 7.]

"A reversal on appeal does not disqualify a judge nor is it evidence of bias or prejudice."

People vs. Keller (1966)  
54 Cal. Rptr. 154

There was no record of the disqualification hearing and reporters were not present at all the prior hearings in the case.

The court said in Thomlinson vs. Superior Court (1944) 66 CA2d 640 that where there was no record of the disqualification hearing, it must be assumed the evidence supported the trial court.

THE CASES CITED BY THE COURT OF APPEAL TO DISQUALIFY JUDGE RICHARD B. EATON ARE IRRELEVANT AND NOT APPLICABLE AS THEY DO NOT FIT THE FACTS IN THE CASE AT BAR.

In the Kohn vs. Superior Court (1966) 239 CA2d 428 defendants had been indicted by the grand jury. The judge did not indict the defendants. The judge in that case could not have determined a question of fact. The case is clearly inapplicable.

In the Eagle Maintenance and Supply Co. vs. Superior Court (1961) 196 CA2d 692. The judgment was never entered. In the case at bar the judgment was not only entered but it was finalized and an appeal taken from it. Therefore, the motion was no longer proper.

8.

The Goodenough vs. Superior Court case cited by the Court of Appeal (1971) 18 CA 3d 692, 697 merely said a peremptory writ may be issued without issuance of an alternative writ where there is no other adequate remedy. TI&T in the case at bar has an adequate remedy by appeal. The Court said in Bumpus v. Uniroyal 385 F. Supp. 711 (1974) that a motion for disqualification was never meant to be a substitute for **appeal**.

THE DECISION OF THE COURT OF APPEAL IS CONTRARY AND IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS AND VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

The federal question was raised in plaintiff-petitioner's petition for hearing at page 42 quote:

"The Court of Appeal denied both state and federal constitutional rights. See Article I, Section 7, and Article VI of the Constitution of the State of California, and the Fourteenth Amendment of the Constitution of the United States...." and the Fourteenth Amendment was set forth verbatim in the petition with emphasis on the denial of equal protection of the laws.

The California courts denied the federal question without comment.

The Court said in People vs. Tappen  
266 CA2d at 813

"The defendants failure to challenge a judge under Section 170.6 prior to appeal is a strong indication that the contention has no merit."



In Oliver vs. Michigan State Bar of Education 508 F2d 178 [8] ruled where the motion is not made until the judgment was entered; and the Court had invested substantial judicial time there was no just cause to disqualify the judge."

In the case at bar defendants TI&T scheduled ~~its~~ motions before Judge Eaton - the very judge they now claim is biased against them. The Court said in People vs. Barnfield (1975) CA2d Criminal 26261 "...once a judgment is rendered the same time span in the judicial process has been covered as is covered by a trial on the merits and a motion pursuant to 170.6 is no longer proper."

The Court said in BUMPUS v. UNIROYAL TIRE DIVISION OF UNIROYAL INC. 385 F. Supp. 711 (1974) [2,6,8]

"Attorneys affidavit insufficient to meet statutory requirement. To demonstrate necessary kind of bias sufficient to require judge to recuse himself, affidavit must set forth more than adverse rulings since statute authorizing disqualification was never meant to be a substitute for an appeal." "To be sufficient affidavit must give fair support of a bent of mind that may prevent or impede impartiality. Chief Justice Sircia in U. S. vs. Mitchel 377 F. Supp. 1312, 1316-1317 (1974) discussed in Watergate, citing Federal Facilities Realty Trust 140 F. Supp. 522 "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States vs. Grinnel Corp. 384 U. S. 563, 583.

## S U M M A R Y

TI&T is the largest title insurance company in the business; and, daily it handles the life savings of thousands of the public. It should not be permitted to escape its obligations by making a mockery of the judicial system with its unlimited resources and legal talents.

Petitioner has been greatly damaged by the delay in excess of six years. It shocks the conscience. If TI&T is permitted to disqualify Judge Eaton, it will be possible for TI&T to disqualify each succeeding judge until TI&T obtains a favorable decision.

The Court of Appeal decision deprives the public of equal protection of the laws under both the State and Federal Constitutions. TI&T were original parties to the lawsuit. It was TI&T that scheduled its motions before Judge Eaton. TI&T dissatisfaction of Judge Eaton is the result of his adverse ruling which Judge Eaton made from the facts he learned in participation in the case and not from any extra judicial source. TI&T have no grounds to disqualify Judge Eaton from sitting in the case.

## C O N C L U S I O N

The writ of certiorari should issue. This court should follow its own precedents as the trial court did; and, squash the Court of Appeal's peremptory writ prohibiting Judge Eaton from sitting in the case; and, affirm the trial court's judgment that awarded petitioner the \$20,000. against Title Insurance and Trust Company.

Respectfully submitted,

HELEN FAYE GENERES

# APPENDIX

## Appendix "A"

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SHASTA Dept. I

Minute Book 105 #45113  
Page 438  
Dec. 9, 1975

HELEN FAYE GENERES, Plaintiff ]  
vs. ]  
HAROLD A. BURSELL, et al., Defendants]

NATURE OF PROCEEDINGS:

MOTION IN OPPOSITION TO PEREMPTORY  
DISQUALIFICATION OF JUDGE EATON

Plaintiff Helen Faye Generes appearing in propria persona, and J. M. Wells, Jr., attorney, appearing on behalf of defendant Title Insurance & Trust Company, the above matter comes on for hearing. Defendants Bursell are not present in person or by counsel.

The Court states that inasmuch as it has heretofore determined an issue of fact, the 170.6 C.C.P. Disqualification will be disregarded.

The Court further states that a Remittitur was received on December 2, 1975, stating "The order is reversed and the cause remanded to the trial court with a direction to set aside the default and default judgment against Title Insurance and Trust Company.

IT IS SO ORDERED. Let the case go forward in due course of law.

/s/ RICHARD B. EATON - Judge.

Appendix "B"

COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

Title Insurance and Trust Company, A California  
Corporation,

Petitioner

vs.

SUPERIOR COURT IN AND FOR THE COUNTY OF  
SHASTA

Respondent

HELEN FAYE GENERES

Real Party in Interest

3 Civil 15673 Shasta No. 45113

PEREMPTORY WRIT OF PROHIBITION

TO THE SUPERIOR COURT FOR THE COUNTY OF  
SHASTA, AND HONORABLE RICHARD B. EATON,  
JUDGE, Respondents, and HELEN FAYE GENERES,  
Real Party in Interest:

You are hereby directed forthwith to comply  
with the directions of the attached opinion  
or order of this court which has now become  
final.

WITNESS THE HONORABLE ROBERT K. PUGLIA, Pre-  
siding Justice of the Court of Appeal of the  
State of California, in and for the Third  
Appellate District.

Attest my hand and the seal of the court this  
6th day of April 1976.

WILFRIED J. KRAMER, Clerk  
By Mary Louise King,  
Deputy

BY THE COURT:

Petition seeks a writ of prohibition  
restraining Judge Richard B. Eaton of  
respondent court from hearing further  
proceedings in the instant case.

Petitioner, who suffered a default  
judgment in this case appeared be-  
fore Judge Eaton and moved to set  
aside the default under Code of  
Civil Procedure 473. The motion was  
denied, but this court subsequently  
reversed the order of denial and set  
aside the default. On remand, prior  
to the hearing of further proceed-  
ings, petitioner moved to disqualify  
Judge Eaton under code of civil  
procedure 170.6 which he denied on  
the ground that he had previously  
determined an issue of fact.

A motion to disqualify a judge under  
code of civil procedure 170.6 may be  
made after any hearing or proceeding  
held prior to trial, including a hear-  
ing on a motion to set aside a default  
judgment, which does not involve a  
determination of a contested fact  
issue relating to the merits of the  
case. (Kohn v. Superior Court (1966)  
239 Cal. App. 2d 428, 430; Eagle  
Maintenance & Supply Co. vs. Superior  
Court (1961) 196 Cal. App. 2d 692).  
Since this determination was not on the  
merits, the motion to disqualify was  
not untimely and its denial was error.



The real party having appeared and due notice having been given to respondent court, this court is empowered to issue a peremptory writ without prior issuance of an alternative writ. (Code of Civil Procedure §§1088, 1105; cf. Goodenough v. Superior Court (1971) 18 Cal. App. 3d 692, 697.)

Let a peremptory writ of prohibition issue prohibiting respondent court from hearing proceedings in the instant case until Judge Eaton is removed and another judge assigned.

FOR THE COURT:

PUGLIA P. J.

JANES J.

Appendix "C"

CLERK'S OFFICE, SUPREME COURT  
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

**MAR 31 1976**

I have this day filed Order\_\_\_\_\_

**HEARING DENIED**

In re: 3 Civ. No. 15673

Title Insurance and Trust  
Company

vs.

Superior Court, Shasta

Respectfully,

G. E. BISHEL  
Clerk

## VERIFICATION

Helen Faye Generes, being first duly sworn states that she has read the foregoing document and understands it; and that it is true and correct to the best of her knowledge and belief.

State of California  
County of Shasta

Helen Faye Generes, being first duly sworn, did appear before me this \_\_\_\_ day of June 1976 and did sign the foregoing instrument in my presence. My commission expires \_\_\_\_.

### NOTARY PUBLIC

The undersigned under penalty of perjury declares that she is a citizen of the United States and a resident of the County of Shasta, over the age of eighteen years, and not a party to the above entitled action, with a business address of 1708 Placer St. Redding, Ca.; and that there is delivery service to the United States Mail to each place addressed; and that she executed this certificate on this day and served a true copy of the foregoing document by placing same in an envelope fully prepaying postage thereon and depositing said envelope in the United States Mail Post Office Box at Redding, Ca. on \_\_\_\_ day of June 1976 addressed as follows: Lopez, Kennedy & Srite P. O. Box 1826, Redding, Ca. 96001.

Court of Appeal, Library & Courts Bldg.

Sacramento, California 96001

Shasta County Superior Court -1500 Court Street, Courthouse, Redding, California 96001.

Hon. Judge Eaton, Dept. I, Courthouse, 1500 Court Street, Redding, California 96001.

All parties required to be served have been served. I declare under penalty of perjury the above is true and correct. Dated: June \_\_\_\_ 1976. Redding, Ca.

\_\_\_\_\_  
Lenora Smith